STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2010
v	No. 287913 Wayne Circuit Court
AARON JERON MONTGOMERY, Defendant-Appellant.	LC No. 08-007184-FC

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 40 to 70 years' imprisonment for the second-degree murder conviction, 10 to 20 years' imprisonment for the assault with intent to do great bodily harm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish that he was one of the shooters in an August 23, 2007 drive-by shooting on Birwood Avenue in Detroit. We disagree. We "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Identity is an essential element in a criminal case. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). "Identity may be shown by either direct testimony or circumstantial evidence which gives the jury an abiding conviction to a moral certainty that the accused was the perpetrator of the offense." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

Eddie Perry testified that, after Javonte Cochrane arrived at the abandoned house on Prairie Street with a stolen van, the two men, along with defendant, Kenneth Thompson, and Robert Austin, decided to "ride up on" a group that gathered near Fenkell Street. A member of that group had previously shot Austin. Perry saw defendant take a loaded AK-47 from the Prairie Street house. Perry drove the stolen purple van; defendant sat in the seat behind the front

passenger seat. When Perry turned the van onto Birwood Avenue from Fenkell Street, a white conversion van obstructed the van's path. According to Perry, defendant grew impatient waiting for the conversion van to move, and he slid open the van's side door and began shooting the AK-47. Perry estimated that defendant shot 20 to 30 bullets from the AK-47. When the conversion van moved, defendant told Perry to "go." Defendant also stated that "they're lucky," referring to the fact that the clip in the AK-47 had been emptied. Perry testified that defendant carried the AK-47 back to the Prairie Street house. Shell casings commonly fired from an AK-47 were found on Birwood Avenue. Eyewitness testimony indicated that gunfire came from inside the purple van.

Defendant challenges Perry's credibility because Perry testified pursuant to a plea deal and had previously provided an affidavit containing false statements. However, "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant was the person who shot the AK-47. Defendant's convictions are supported by sufficient evidence.

II. Cruel and Unusual Punishment

Defendant claims that his sentences for second-degree murder and assault with intent to commit great bodily harm constitute cruel and unusual punishment. We disagree.

Defendant does not contest that his sentences are within the recommended minimum sentence ranges of the legislative guidelines. "A sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citation omitted).

Defendant has failed to overcome the presumption that his sentences are proportionate. The trial court was not required to consider the sentences of defendant's accomplices in the drive-by shooting. "Sentences must be individualized and tailored to fit the circumstances of the defendant and the case." *People v Colon*, 250 Mich App 59, 64; 644 NW2d 790 (2002) (quotation omitted). A sentence must be proportionate to the nature of the defendant's conduct and to the defendant's criminal record. *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008). Defendant agreed to the plan to "ride up on" the group that gathered near Fenkell Street, and he sprayed 20 to 30 bullets from an AK-47 into the group. After the shooting, defendant stated that the crowd was "lucky" that he ran out of ammunition. In addition, defendant's criminal record reveals an inability to conform his conduct to the law. Under the circumstances, defendant's sentences are proportionate.

Defendant's argument that his sentences constitute cruel and unusual punishment because he likely will not live to serve the minimum or maximum sentence for his second-degree murder conviction is meritless. A sentence is not invalid merely because it has the effect of keeping the defendant in prison for life. *People v Kelly*, 213 Mich App 8, 13-16; 539 NW2d 538 (1995).

III. Prosecutorial Misconduct

In his standard 4 brief, defendant claims that the prosecutor committed misconduct and denied him a fair trial.

A

In two conclusory sentences without citation to authority, defendant maintains that the introduction of a recording of a telephone call he made from jail constituted prosecutorial misconduct because the prosecutor claimed it was evidence that defendant attempted to intimidate Eddie Perry, but "[n]o 'evidence' was offered to establish that this was actually the case though." Because defendant fails to support this claim with any meaningful analysis, we find that defendant has abandoned the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Regardless, we note that the record shows that the recording was admitted for the limited purpose of corroborating Perry's testimony that defendant was familiar with Perry and the house on Prairie Street. To the extent that the prosecutor may have relied on the recording to show that defendant attempted to intimidate Perry,[1] defendant failed to object to the argument, and he cannot establish that a timely objection and curative instruction would not have cured any resulting prejudice. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

B

Defendant next contends that the prosecutor committed misconduct in admitting evidence that third parties had threatened Perry in jail. This claim of prosecutorial misconduct is unpreserved, and we review it for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Evidence of a defendant's threat against a witness is admissible to demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). But, a defendant's relationship to a third party, alone, is insufficient to connect the defendant to threats by the third party against a witness. See *People v Culver*, 280 Mich 223, 226; 273 NW 455 (1937). The record does not establish that the challenged evidence was admitted against defendant to insinuate that he was behind any third-party threats to Perry. Rather, the prosecutor's inquiry into any threats Perry received while in jail related to the circumstances under which Perry wrote an affidavit in which he recanted his earlier testimony that Austin was involved in the drive-by shooting. In addition, there is no indication that the prosecutor elicited the evidence in bad faith. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

C

Defendant asserts that the prosecutor shifted the burden of proof in closing argument when the prosecutor argued, "You have no testimony, whatsoever, that would in any way explain

[1] In her closing argument, the prosecutor argued, "You heard the Defendant, Mr. Montgomery, on the CD try to exert some peer pressure of his own. He issued orders to the hood about everyone coming to court."

why Eddie Perry would make this up on Aaron Montgomery." Defendant objected to the argument; we therefore review the challenged remark de novo. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

Because a defendant is presumed innocent until proven guilty, a prosecutor "may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence." *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). However, a prosecutor is permitted to comment on the improbability of a defendant's asserted theory. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "[A]ttacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). In his opening statement, defense counsel argued that Perry implicated defendant in the drive-by shooting because Perry owed him money and "one of the best ways to erase a debt, to erase an enemy is to implicate them in a serious crime." While cross-examining Perry, defense counsel asked Perry if Perry had a falling out with defendant, if Perry owed defendant money, and if Perry implicated defendant to eliminate a debt or an enemy. Perry answered no to the questions. When read in context, the prosecutor's argument was an attack on defendant's theory that Perry implicated defendant in the shooting to eliminate a debt or an enemy. The prosecutor did not shift the burden of proof.

Defendant also asserts that the prosecutor misstated the law when she argued, "[I]f you believe Eddie Perry beyond a reasonable doubt, then that alone is sufficient for conviction. You may base your verdict on that alone." Defendant claims that this was a misstatement of the law because the jury could not convict defendant of a crime merely because it believed Perry's testimony; rather, it could only convict defendant if every element of a charged offense was proven beyond a reasonable doubt. We review this preserved claim of prosecutorial misconduct de novo. *Thomas*, 260 Mich App at 453.

When read in context, the prosecutor's argument does not suggest that the jury, if it believed Perry, may dispense with the requirement that it must find that all the elements of a charged offense were proven beyond a reasonable doubt. Rather, the prosecutor argued that Perry's testimony, alone, may provide a sufficient basis for the jury to find that the elements of a crime were proven. This was not a misstatement of the law. "A jury may convict on the basis of accomplice testimony alone." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).[2]

IV. Testimony of Prior Incarceration

Defendant also argues in his Standard 4 brief that he was denied a fair trial when the prosecutor elicited testimony that he had previously been in prison. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[2] Defendant also complains that the prosecutor's cumulative acts of misconduct denied him a fair trial. The argument must fail because there were no errors in this case to accumulate. *Dobek*, 274 Mich App at 106.

Generally, evidence relating to a defendant's prior incarceration is not admissible at trial. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). A defendant is deprived of a fair trial where a witness testifies about the defendant's prior incarceration in response to the prosecutor's question and the answer was "clearly anticipated or hoped for, [and] was calculated to prejudice the minds of the jurors against the defendant." *People v Greenway*, 365 Mich 547, 551; 114 NW2d 188 (1962).

Perry testified that he, defendant, Austin, Thompson, and Cochrane were "always" at the Prairie Street house. During redirect examination, the following colloquy occurred between the prosecutor and Perry:

> *Q*. How long has Aaron Montgomery been your friend?
>
> *A*. Known him for, like, two years.
>
> *Q*. And you said you saw him every single day?
>
> *A*. Mostly, yes. When he got out last year, I think it was, like, April or May, we were together everyday.

Perry's brief reference to the fact that he saw defendant every day after defendant "got out last year" does not amount to plain error affecting substantial rights. There is no indication that the prosecutor acted in bad faith; nothing in the record indicates that the prosecutor anticipated and hoped that Perry would mention defendant's prior incarceration. Rather, Perry's answer appears to have been volunteered and unresponsive to the exact question asked by the prosecutor. "[A]n isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice." *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).[3]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly

[3] We reject defendant's claim that counsel was ineffective for failing to object. "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).